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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 306

TALMADGE RALEY,
JOSEPH STERN,
EMMETT CALVIN BROWN,

Appellants.

v.

STATE OF OHIO,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

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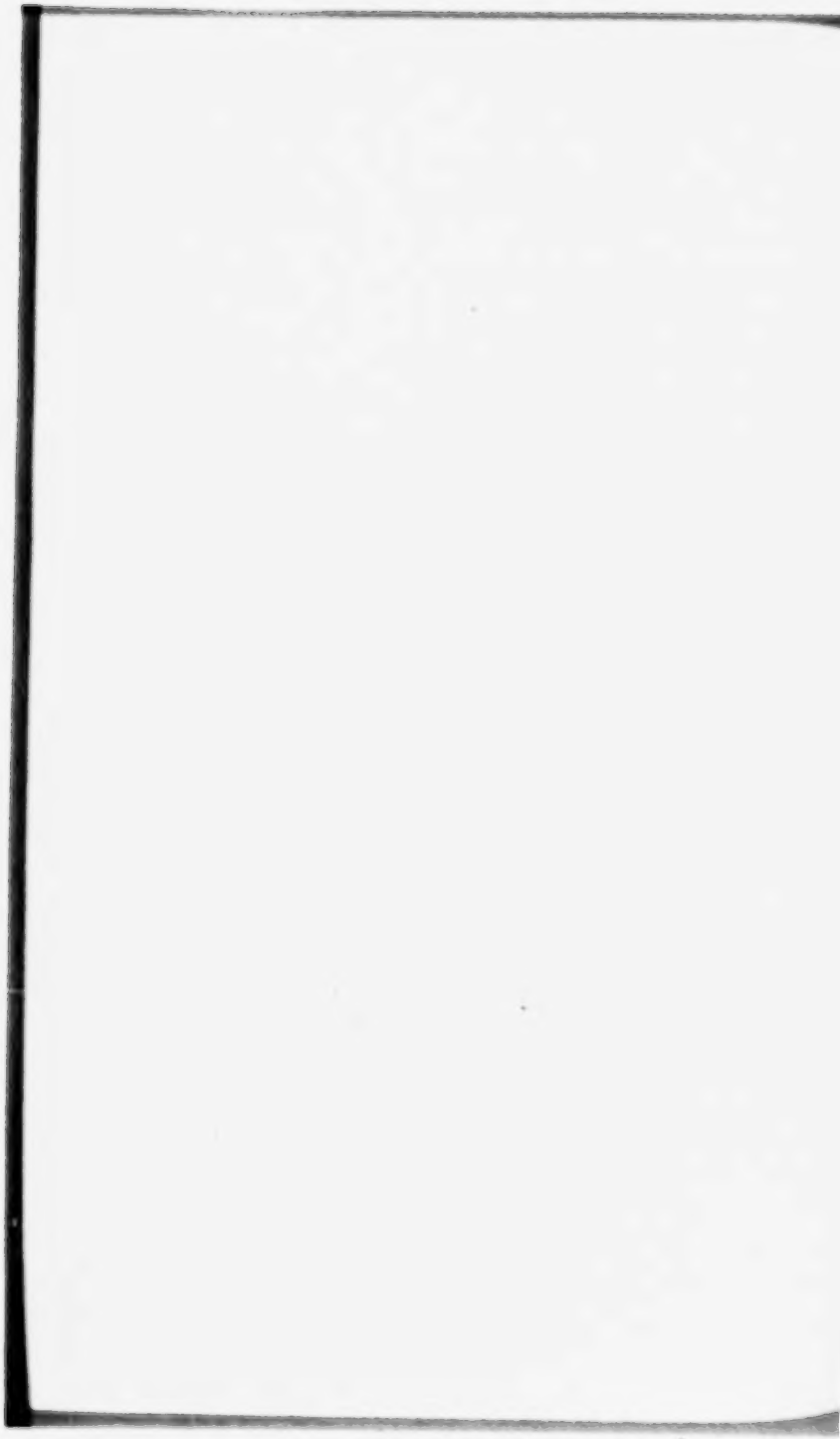

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STATEMENT AS TO JURISDICTION

Appellants, Talmadge Raley, Joseph Stern and Emmett Calvin Brown, submit the following statement in support of their contention that the questions presented herein are substantial and that there is sufficient basis to invoke the jurisdiction of this Court to review on appeal the judgment and order of the Supreme Court of Ohio in Case No. 34361 in said Court, affirming the judgments of conviction of appellants herein by the Court of Appeals for Hamilton County, Ohio, which Court of Appeals affirmed in part and reversed in part judgments of conviction of appellants by the Common Pleas Court of Hamilton County, Ohio.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is officially reported in 164 O. S. 529, 133 N. E. 2d 104. A copy of this opinion is attached in Appendix "A".

A copy of the opinion of the Court of Appeals for the First Appellate District of Ohio as furnished counsel is attached as Appendix "B". The opinion, with some changes in punctuation and grammar, is officially reported in 100 O. App. 75, Ohio Bar Advanced, No. 27, July 2, 1956.

A copy of the judgment and order of the Supreme Court of Ohio appealed from is attached as Appendix "F".

JURISDICTION

1. This is an appeal from a judgment and order of the Supreme Court of Ohio affirming the judgment of the Court of Appeals for Hamilton County, Ohio. Appellants were convicted by the Court of Common Pleas, Hamilton County, Ohio, of contempt of the Ohio Legislature under Ohio Revised Code Section 2705.02 (formerly Ohio General Code Section 12137) for refusing to testify as to certain questions asked them in a proceeding held in Cincinnati, Ohio on October 20, 1952 by the un-American Activities Commission of Ohio (hereinafter called Commission). Said Commission was established under the authority of Ohio Revised Code Sections 103.31 through 103.38 (formerly Ohio General Code Sections 76-28 through 76-35), enacted on June 18, 1951, with broad powers to investigate and report on persons, groups and organizations who "have as their objective or may be suspected of having as their objective the overthrow or reform of our constitutional governments by fraud, force, violence, or other unlawful means," who are "known to be or suspected of being dominated by or giving allegiance to a foreign power or whose activities might adversely affect" the state or federal government or

their agencies. It was also empowered to investigate the operation of state laws concerned with such activities, to recommend legislation as may seem advisable and necessary and to maintain "a liason with any agency of the federal, state or local governments in devising . . . means of disclosing" subversive persons and groups.

The validity of the state laws on which the contempt convictions were based was called into question on the following grounds:

(a) The Commission was without constitutional authority to investigate and compel testimony since the federal government had preempted and superseded the power of the state to act and legislate in the area of subversive activities;

(b) The failure of the Commission to direct appellants to answer questions to which appellants had asserted their privilege against self-incrimination or to indicate in any other manner that appellants could not properly refuse answers under the protection of such privilege made convictions for contempt repugnant to the Fourteenth Amendment to the Constitution of the United States;

(c) The express assurance by the Commission to the appellants at the hearing that they were entitled to their privilege against self-incrimination under Article I Section 10 of the Constitution of Ohio and the failure of the Commission or its counsel or any other state officials to advise them that the state law would grant them immunity from criminal prosecution in Ohio as to any matters disclosed by their answers made their convictions for contempt, because (as the Court held) they were protected by the Ohio immunity statute, repugnant to the Fourteenth Amendment to the Constitution of the United States;

(d) The application of the State immunity statute which does not and cannot grant immunity from prosecution by the United States or other states is repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States;

(e) The authority granted the Commission and the questions asked appellants were repugnant to the First and Fourteenth Amendments to the Constitution of the United States.

The decision of the Supreme Court of Ohio was in favor of the validity of the state laws on which the contempt convictions were based.

2. The Supreme Court of Ohio handed down its judgment and order on February 23, 1956. Appellants' Application for a Rehearing was denied on March 21, 1956. Notice of Appeal was filed with the Clerk of the Supreme Court of Ohio on June 16, 1956.

3. The statutory provision believed to confer jurisdiction of the appeal on this Court is 28 U. S. C. A. Section 1257 (2).

4. The following cases are believed to sustain the jurisdiction of this Court:

Pennsylvania v. *Nelson*, 350 U. S. 497, 76 S. Ct. 477, 100 L. Ed. (Advance P. 415);

Ullman v. *United States*, 350 U. S. 422, 76 S. Ct. 497, 100 L. Ed. (Advance P. 361);

Quinn v. *United States*, 349 U. S. 155, 75 S. Ct. 668, 99 L. Ed. 964;

Smith v. *O'Grady*, 312 U. S. 329, 61 S. Ct. 572, 85 L. Ed. 859;

Jack v. *Kansas*, 199 U. S. 372, 26 S. Ct. 73, 50 L. Ed. 234;

United States v. *Rumely*, 345 U. S. 41, 73 S. Ct. 543, 97 L. Ed. 770;

United States v. *Bryan*, 339 U. S. 323, 70 S. Ct. 724, 94 L. Ed. 884;
Counselman v. *Hitchcock*, 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110;
Hoffman v. *United States*, 341 U. S. 479, 71 S. Ct. 814, 95 L. Ed. 1118;
Boyd v. *United States*, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746;
Blau v. *United States*, 340 U. S. 159, 71 S. Ct. 223, 95 L. Ed. 170.

5. The Ohio Statutes, the validity of which is involved, are Section 101.44 Ohio Revised Code, Sections 103.31-103.38 Ohio Revised Code, and Section 2705.02 Ohio Revised Code. Copies of these statutes are attached as Appendix "C", "D" and "E".

QUESTIONS PRESENTED

1. Is Section 103.34 of the Revised Code of Ohio creating the powers and duties of the Ohio un-American Activities Commission contrary to the Constitution of the United States since it legislates in an area and authorizes legislative investigation in an area in which United States Congressional action has preempted and superseded the power of the state?

2. Are the statutes involved, as interpreted and applied by the Supreme Court of Ohio, under which appellants were convicted of contempt for refusing to answer certain questions propounded to them by the un-American Activities Commission of Ohio, in violation of the due process clause of Section I of the Fourteenth Amendment to the Constitution of the United States for the reason that appellants were not directed by said Commission to answer such questions following appellants' assertion of their privilege against self-incrimination, and since in addition the Commission did not indicate in any manner that the privilege of silence was unavailable to appellants?

3. Are the statutes involved, as interpreted and applied by the Supreme Court of Ohio, under which appellants were convicted of contempt for refusing to answer certain questions propounded to them by the un-American Activities Commission of Ohio, in violation of the due process clause of Section I of the Fourteenth Amendment to the Constitution of the United States for the reason that although appellants were expressly advised by said Commission that they were entitled to their privilege against self-incrimination, said Court held that under the State immunity statute, Ohio Revised Code Section 101.44, appellants were not entitled to such privilege?

4. Are the statutes involved, as interpreted and applied by the Supreme Court of Ohio, under which appellants were convicted of contempt for refusing to answer certain questions propounded to them by the un-American Activities Commission of Ohio, in violation of the due process clause of Section I of the Fourteenth Amendment to the Constitution of the United States for the reason that the State immunity statute, Ohio Revised Code Section 101.44, under which appellants were denied their privilege against self-incrimination does not and could not grant immunity from prosecution by the United States or other States?

5. Are the statutes involved, as interpreted and applied by the Supreme Court of Ohio, under which appellants were convicted of contempt for refusing to answer certain questions propounded to them by the un-American Activities Commission of Ohio, in violation of the privilege against self-incrimination clause of the Fifth and Fourteenth Amendments to the Constitution of the United States for the reason that the State immunity statute, Ohio Revised Code Section 101.44, under which the appellants were denied their privilege against self-incrimination, does not and could not grant immunity from prosecution by the United States or other States?

6. Are the statutes involved, as interpreted and applied by the Supreme Court of Ohio, under which appellants were convicted of contempt for refusing to answer certain questions propounded to them by the un-American Activities Commission of Ohio, in violation of the freedom of speech and assembly clauses of the First and Fourteenth Amendments to the Constitution of the United States for the reason that said Commission was authorized to investigate, and the appellants were asked questions concerning their beliefs, opinions, activities, affiliations and discussions?

STATEMENT

Raley, Brown and Stern, the appellants herein, were individually summoned to appear and to testify under oath before the un-American Activities Commission of Ohio at a session held in Cincinnati, Ohio, on October 20, 1952. In that proceeding each appellant was asked many questions and in many instances each appellant refused to answer such questions asserting the privilege against self-incrimination under the constitutional provisions. The appellants were later separately indicted by the Grand Jury of Hamilton County, Ohio, for contempt of the Ohio legislature for refusing to testify as to certain specified questions asked them in that proceeding. Appellant Stern's indictment contained two counts based on two different questions. Appellant Brown's indictment contained four counts based on four different questions. Appellant Raley's indictment contained sixteen counts based on sixteen different questions.

While the particular questions differed as to each appellant, their cases involved the same questions of law and by agreement were tried together in the Court of Common Pleas for Hamilton County, Ohio. They were later consolidated for the appeal in the Court of Appeals. Motions to quash, pleas in abatement and demurrers to the indict-

ments were overruled. A jury trial was waived and the trial court found each appellant guilty of contempt as charged under each count in the indictments. Each appellant was sentenced to ten days in jail under each count of the indictment, the sentences to run concurrently, and each was fined $500.00 and costs under each count, the fines as to all but the first count in each case being remitted.

On appeal the Court of Appeals for Hamilton County, Ohio, affirmed the conviction as to Raley on ten counts, reversed as to six, affirmed the conviction as to Stern on one count and reversed as to one, and affirmed the conviction as to Brown on all counts.

On appeal, the Supreme Court of Ohio affirmed the said judgment of the Court of Appeals.

The statute which created the Commission and under which it was authorized to act (Appendix "D") shows on its face that the purpose and power of the Commission was to investigate subversive and seditious activities, persons and groups. The record of the hearings of the Commission which resulted in the indictments for contempt of appellants herein is attached to the Record and identified as ". . . Report on . . . *Cincinnati, Ohio Hearings* October 20, 1952" (Exhibit 6), and the "Report of the un-American Activities Commission State of Ohio 1951-1952" is attached to the Record (Exhibit 7). Both demonstrate that the Commission concerned itself with investigating sedition, Communist seditious activities, and subversive organizations. In particular, the Cincinnati hearings (Exhibit 6) show throughout that each appellant herein was interrogated as to his suspected Communist and subversive activities in Ohio and other states and as to his suspected associations with others who were allegedly Communists, or had been convicted or indicted under the Smith Act, or had been accused of plotting the overthrow of the federal government by force.

Appellants questioned the constitutional power of the State of Ohio to investigate and legislate in such area in their brief, reply brief and oral argument in the Court of Appeals. That Court specifically rejected the assertion that the federal government had by Congressional action superseded the power of the State to act in this area (Appendix "B", pp. 56a-60a). Appellants again raised this federal question in the Supreme Court of Ohio as Assignment of Error No. 7 (Transcript of Record, the Supreme Court of Ohio, p. 14) and in their brief and oral argument. That Court did not refer to this question in its decision and therefore did not disagree with the holdings of the Court of Appeals. Appellants again raised the question in the Application for Rehearing (Transcript of Record, the Supreme Court of Ohio, p. 77) which was denied.

The invalidity of the proceedings under the First, Fourth and Fifteenth Amendments to the Constitution of the United States were initially raised in the motions to quash, pleas in abatement and demurrers to the indictments ("Questions of Law" attached to Record) and were rejected by the trial court. The Court of Appeals and Supreme Court also rejected appellants' assertion on briefs, in oral arguments, and in their Assignment of Errors (Transcript of Record, Supreme Court of Ohio, pp. 13-14) that the convictions violated the First, Fifth and Fourteenth Amendments to the Constitution.

The opinions of the Court of Appeals (Appendix "B") and the Supreme Court (Appendix "A") show that the specific federal questions presented herein were passed on by those courts. These opinions detail the facts material to the consideration of the questions presented and these facts are not in dispute.

The Report on Cincinnati Hearing (Exhibit 6) shows throughout that in all but one (Exhibit 6, p. 149), and possibly two (Exhibit 6, p. 99) the appellants were not directed

to answer the questions which formed the counts in their indictments, nor were they given any indication that the Commission overruled their assertions of the privilege and considered such assertions contumacious. The Court of Appeals held such direction unnecessary if a member of the Commission asked the question (Appendix "B", pp. 62a, 63a-76a) and the Supreme Court held such direction unnecessary in view of the applicability of the state immunity statute (Appendix "A", p. 19a et seq.). This question was again raised on the Application for Rehearing (Transcript of Record, Supreme Court of Ohio, p. 73) which was denied.

The trial court and the Court of Appeals did not base their decisions on the applicability of the state immunity statute, although the Court of Appeals rejected appellants' assertion, on brief and in oral argument, that it was inapplicable in view of the Commission's assurance to the appellants that the privilege was available (Appendix "B", p. 78a). The Record (Bill of Exceptions, pp. 28-29) and the decisions of both the Court of Appeals (Appendix "B", p. 78a) and the Supreme Court (Appendix "A", pp. 27a-28a) and particularly the dissenting opinion of Judge Stewart (Appendix "A", pp. 43a-46a) show that the Commission misled the appellants as to their rights under the state immunity statute and their privilege against self-incrimination. The invalidity of this ruling under the Fourteenth Amendment was again raised on the Application for Rehearing (Transcript of Record, Supreme Court of Ohio, pp. 73-75) which was denied.

It is clear that the state immunity statute (Appendix "C") does not and could not grant immunity from prosecution by the federal government and other states. It is also clear that the Commission by its legislative mandate (Appendix "D") was authorized and directed to investigate subversive activities unlawful under federal and other

state laws and to transmit incriminating information received to the federal and other state governments. The Court of Appeals (Appendix "B", pp. 62a, 63a, 76a) sustained the validity of this statute as did the Supreme Court of Ohio (Appendix "A", pp. 28a-31a, 32a) although one judge dissented, asserting the appellants had been denied their rights under the Fifth Amendment to the Constitution (Appendix "A", pp. 37a-43a).

The statute (Appendix "D") shows on its face that the Commission was granted broad powers to investigate persons and groups. The Report of the Commission (Exhibit 7) and the Cincinnati Hearings (Exhibit 6) show the wide sweep of interrogation under this statute. The questions constituting the fourth count in Brown's indictment (Appendix "B", p. 76a) and the ninth count in Raley's indictment (Appendix "B", pp. 71a-72a) are examples of the questions concerning beliefs and opinions which this Commission was authorized to ask and did ask. The Court of Appeals and the Supreme Court rejected appellants' assertion that this statute violated the First and Fourteenth Amendments.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are so substantial as to require plenary consideration by this Court with briefs on the merits and oral arguments for their resolution. Each question presented involves constitutional principles which affect the basic rights of appellants herein and of all of the citizens of the United States. In addition, each question presents a basic constitutional issue which either has not heretofore been resolved by this Court or on which the ruling of the Ohio Courts is in conflict with prior decisions of this Court. An analysis shows that the Supreme Court of Ohio's interpretation and application of the statutes involved raises substantial questions as to the constitutional validity of these statutes.

This Court held in *Pennsylvania* v. *Nelson*, 350 U. S. 497, that Congress had occupied the field of sedition and subversive activities to the exclusion of parallel state legislation, that the dominant interest of the federal government precluded state intervention and that administration of state acts would conflict with the operation of the federal plan. Appellants have been convicted of contempt of a state legislative commission the title of which—un-American Activities Commission of Ohio—and the legislative mandate under which it acted (Appendix "D") clearly show that the state was legislating, intervening and administering in the field of sedition and subversive activities. Can a state be without constitutional power to enact criminal sedition laws and still constitutionally compel testimony from its citizens under penalty of contempt as to acts of subversion and sedition? Can citizens be constitutionally fined and sentenced for refusing to give testimony before a state commission empowered to investigate and recommend legislation in furtherance of powers which the state cannot constitutionally exercise?

As to all but one, possibly two, questions which formed the counts of the indictments herein, appellants' assertion of their privilege was as far as appellants knew accepted by the Commission. No direction to answer was given to appellants. The Commission in no way apprised the appellants that it rejected their invocations of the privilege. Is it due process of law under the Fourteenth Amendment to punish a witness for not testifying under oath when the authority before which he is testifying requires him to guess whether it considered his assertion of the privilege contumacious? Under *Quinn* v. *United States*, 349 U. S. 155, and other cases, is not a clear disposition of the witness' objection a prerequisite to a prosecution for contempt under the due process clause of the Fourteenth Amend-

ment? Is not the breach of a "long standing tradition" in the United States and other English-speaking countries that witnesses must be apprised of the rejection of their constitutional objection to a question in violation of the Fourteenth Amendment?

The Courts below recognized that appellants were clearly, unequivocally and frequently advised by the Commission that they could refuse to answer questions which might tend to incriminate them. The Commission in effect ruled that appellants were not protected by the state immunity law. The Supreme Court stated (Appendix "A", p. 27a) that the Chairman had "misstated the law" to the appellants. The Court held, nevertheless, that the appellants were protected by the immunity statute, were not entitled to the privilege, and were, therefore, guilty of contempt. Is it due process of law to impose a jail sentence and fine on appellants for merely asserting what they believed to be a basic constitutional right after they were instructed by the presiding officer at the hearing that they had such right? Under *Smith* v. *O'Grady*, 312 U. S. 329, is it due process for a legislative agency of the state to mislead appellants as to their constitutional rights which the Supreme Court of the state later holds they did not have and by reason thereof are guilty of contempt?

The state immunity statute (Appendix "C") does not and cannot grant immunity from prosecution by the federal government and other states. The Commission was authorized and directed to investigate matters involving violation of federal and other state laws and to maintain a liason with federal and other state agencies concerning unlawful subversive acts. Appellants in testifying before the Commission knew, therefore, that any incriminating testimony would be transmitted to the federal government

and other states for use in prosecution. Judge Hart in his dissenting opinion (Appendix "A", p. 42a) asked:

> "How then, notwithstanding some apparent obiter in decisions of the federal Supreme Court, can a state immunity statute, which compels a witness to answer questions which incriminate him and which admittedly in turn may be used to incriminate him in a federal prosecution where the state immunity statute even against prosecution is wholly inoperative to protect him, be valid in view of the constitutional rights of the witness under the Fifth Amendment to the federal Constitution among which is the over-all right to avoid compulsory self-incrimination?"

If the constitutionality of the Immunity Act of 1954, 68 Stat. 745, 18 U. S. C. (Supp. II) Sec. 3846 is sustained in *Ullman* v. *United States*, 350 U. S. 422, on the ground that it protected a witness from prosecution as to matters testified to in any court, *state* or federal, how can a state immunity statute which does not protect the witness either from prosecution (or use of his testimony in the prosecution) in the federal or other state courts be deemed constitutional?

The Commission's questions to the witnesses ranged over their entire lives: What candidates they supported in certain elections; who did they live with; what was the purpose of pamphlets they circulated, etc. Is there no First Amendment restriction to questions which witnesses can be compelled to answer? How can a witness be compelled to answer these questions in view of the holding in *United States* v. *Rumely*, 341 U. S. 41, that under the First Amendment Congress could not compel by fine and imprisonment what it could not require by law?

The statutes of Ohio in question as interpreted and applied by the Supreme Court of Ohio, therefore, present

to this Court substantial federal questions under the United States Constitution.

Respectfully submitted,

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